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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.468 OF 2003

Javed @ Java Ahmed Mohammed Akbar
Bhatt & Ors. ... Appellants

V/s.

The State of Maharashtra ... Respondent

Mr.S.V. Marwadi for Appellants
Mrs.V.R. Bhosale, APP, for Respondent

CORAM: **V.G. PALSHIKAR &**
SMT.NISHITA MHATRE, JJ.

DATED: **DECEMBER 11, 2006**

JUDGMENT (PER SMT.MHATRE, J.):

. The accused who have been convicted under section 122 of the Indian Penal Code and sentenced to undergo life imprisonment have challenged their conviction and sentence by preferring the present appeal. They have also been convicted for the offence punishable under sections 3 and 25(1B)(a) of the Arms Act and sentenced to undergo imprisonment for three years. The accused have been acquitted in respect of the other offences for which they were charged namely sections 120B, 121A r/w 34 of the Indian Penal Code.

2. The charge against the accused is that they were members of a terrorist organisation Hijbul Mujahid and that on 23.10.2001 they had indulged in a conspiracy to

wage war against the Government of India and had collected men, arms and ammunition without licence, in breach of the Arms Act with the intention of indulging in or being prepared to wage war against the Government of India. The prosecution alleges that on 24.10.2001, the police on information received, conducted a raid at about 3.15am in room No.19, Billak Chawl at Mumbra. They entered the room and found four persons there. On searching them, two of them were found to be carrying Rs.300/- in cash between them. The police then searched the room and found copies of 'Meantime' magazine and some urdu periodicals and literature. A foreign pistol was placed under these periodicals. Besides this pistol other firearms and ammunition were recovered from a bag kept in the room. Another plastic bag containing binoculars and a mobile phone was also found. On enquiry with the four persons present in the room i.e., the accused herein, the police were informed that they did not have any licence for the arms. The police, therefore, seized the aforesaid arms, ammunition and the publications found in the room. A panchanama was drawn up and the First Information Report was lodged at the Mumbra police station. The accused were charged for having committed the offences punishable under sections 120B, 121, 121A and 122 of the Indian Penal Code and under sections 3 and 25(1B)(a) of the Arms Act. The

accused were tried by the Adhoc Additional District and Sessions Judge, Thane, who has convicted them for the offences punishable under sections 122, Indian Penal Code and sections 3(1) and 25(1B)(a) of the Arms Act. The police have relied on five witnesses to prove the charges against the accused.

3. PW1 is the police officer attached to Thane Crime Branch who was one of the persons involved in the raid at the premises in Billak chawl. He has deposed about all the accused being present in Room No.19 in Billak chawl when they entered the room. He has also described the articles which were seized from the room. This witness has stated that the accused were unable to produce licences for the arms discovered in the room. The cross-examination reveals that the panchanama which was drawn up by 6 am, after which the police returned to the crime branch office, Thane with the accused. This witness in his cross-examination has spoken about the sealing and labelling of the articles seized from the room. The First Information Report which is at Exhibit 21 of the proceedings was lodged.

4. The next witness examined by the prosecution is a rickshaw driver who has acted as a panch and has proved the seizure panchanama at Exhibit 24. The

panchanama describes all the articles which were seized from Room No.19, Billak Chawl, including the arms, ammunition and the print publications.

5. The prosecution has then examined PW3. This witness was the Inspector leading the raiding party. He has revealed that the Commissioner of Police, Thane, apprised him and the other five officers who were involved in the raid about the fact that terrorists were living in room NO.19, Billak chawl and that they belonged to the Hizbul Mujahid terrorist gang. According to this witness, he and the other police officers were informed by the Commissioner that the accused were likely to commit serious offences as they possessed arms and ammunition. This witness has described the manner in which the raid was conducted. He has also mentioned the articles seized including 5 issues of Meantime magazine, 2 urdu periodicals, 2 pistols, 1 countrymade revolver (katta), 6 live cartridges in the magazine of a pistol with a star marked on it, 20 cartridges in a plastic bag, 2 diaries, 1 bank passbook, a telephone diary, a camera and a digital diary. He has spoken of binoculars and a mobile phone being recovered from a briefcase. According to this witness, the periodicals contained photographs of important personalities of India and therefore were not

ordinary magazines. He has stated that he sent the weapons and cartridges to the ballistic expert for scientific examination. The investigation was then handed over to another police officer i.e., PW4. PW-3 has stated that the recording of the panchanama was over by 5.15 am. The arms were despatched to the ballistic expert. The witness has then stated that he had not obtained information about the person who owned room No.19. The accused, according to this witness, were working as a watchmen. This witness then has stated that the custody of the accused was handed over to the Kashmir Police for investigation of another offence. The witness then claims that he had knowledge that the accused, Bhatt was connected with the organisation of terrorists and he also claimed to have details of the persons who worked with the accused. From this witness's deposition, it is evident that there was a collection of persons in the aforesaid room and that arms, ammunition and print publications wee seized by the police when the premises were raided.

6. PW4 is the Investigating Officer, who was handed over the investigation by PW3. This witness has collected the report of the ballistic expert and has obtained the sanction to file the chargesheet against the accused as required under law.

7. The Joint Commissioner of Police has also been examined. He is the person who has accorded sanction for prosecuting the accused.

8. To consider whether the accused are guilty of the offences punishable under section 122 of the Indian Penal Code, it would be appropriate to set out a few sections of the Indian Penal Code. Chapter VI of the Code enlists offences against the State. It deals with offences which undermine the authority of the Government by subversive activities aimed at jeopardising and paralysing the State machinery.

Section 121 reads thus:

> 121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India. - Whoever, wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

Section 121A provides for punishment in respect of a conspiracy to commit offences punishable under section 121. It reads thus:

> 121A. Conspiracy to commit offences punishable by section 121. - Whoever within or without India conspires to commit

> any of the offences punishable by section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Section 122 deals with the preparation and intention to wage a war. It provides:

> 122. Collecting arms, etc., with intention of waging war against the Government of India. - Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine. (emphasis added)

9. A bare reading of the aforesaid sections indicates that the prosecution must establish that the accused had the intention to wage a war against the Government of India or that they attempted to wage a war or were preparing to wage a war against the Government of India. As aforesaid, the accused have been convicted for the offence under section 122 while being acquitted of the other charges under the Indian Penal Code. Therefore, we are required to consider whether any offence punishable under section 122 of the Indian Penal Code has been committed by the accused. According to

the well known commentary on the Indian Penal Code by Ratanlal & Dhirajlal the ingredients required to be proved for an act to constitute an offence under section 122 are: (i) there must be a collection of men, arms or ammunition; (ii) such a collection should be with the intention of either waging war or being prepared to wage a war; (iii) the participation of the accused in such a collection; (iv) the war is to be waged against the Government of India.

10. Accepting the case of the prosecution as it is and the evidence led by it, we have before us a situation where the prosecution has proved that there was a collection of men, arms and ammunition in Room No.19, Billak chawl when the police conducted the raid. However, none of the other three ingredients in our opinion, have been established by the prosecution. All that the police officers have stated is that they had information that the accused belonged to the Hizbul Mujahid group. There is nothing on record to substantiate this inference. The other statement by the police officers examined by the prosecution is that the five issues of Meantime magazine were found in the room No.19 with other material. The magazine Jumma in Urdu which was discovered had printed a map of India and bore the stamp of one Narool Amin Khatib, General Secretary,

Thane. Another Urdu periodical Afkar E Mili which had published photographs of Osama Bin Laden and George Bush was also seized. Diaries containing phone numbers and other information written both in Urdu and English and a Mumbai guide were also found in the room. In our opinion, the mere fact that the accused were in possession of the aforesaid publications and diaries would not establish that they were preparing to wage a war against the Government of India. Photographs of important personalities of India are published in very many magazines which may be found in anybody's possession. This cannot lead to the conclusion that the person would want to wage war against India. The collection of arms and ammunition found in the room No.19, Billak chawl, one of which according to the police was a foreign made revolver depicting a star as a mark also does not establish the intention of the accused to wage a war against the Government of India. A collection of these arms or the possession of the many arms mentioned in the Panchanama need not necessarily have been used by the accused for the purposes of waging war or in preparation for waging a war. These arms and ammunition could have been collected for committing some other offence. There is no material at all on record to establish that these arms were collected with the intention to either to wage a war or for being prepared

to wage a war against the Government of India. Accepting the entire evidence of the prosecution all that is proved is a collection of Arms and some books. None of the witnesses say on oath that all this was done to wage a war or to be prepared to wage a war against India. The prosecution should have established that the Urdu periodicals seized contained material inciting people of some organisation to wage war against India.

11. Would a mere collection of men, arms and ammunition amount to waging a war against India? A useful reference can be made to the Law Lexicon of Justice T.P. Mukherjee wherein the expression 'Waging War' is defined. The learned author has culled out a passage from the decision of the Patna High Court in the case of *Mir Hasan Khan & Ors. v/s. The State,* **AIR (38) 1951 Patna 60**. The Division Bench of the Patna High Court has defined the term waging war used in section 121 of the Indian Penal Code thus:

> 11. .... The expression "waging war" means & can, I think, only mean "waging war in the manner usual in war." In other words, in order to support to a conviction on such a charge, it is not enough to show that the persons charged have contrived to obtain possession of an armoury and have, when called upon to surrender it, used the rifles and ammunition so obtained against the King's troops. It must also be shown that the seizure of the armoury was part and parcel of a planned operation and that

> their intention in resisting the troops of the King was to overwhelm and defeat these troops and then to go on and crush any further opposition with which they might until either the leaders of the movement succeeded in obtaining possession of the machinery of Govt. or until those in possession of it yielded to the demands of their leaders."

From the aforesaid observations, it is obvious that the prosecution in such a case must show that the possesion of an armoury or arms was part and parcel of a planned operation and that the intention of the accused was to resist or overthrow or overwhelm the Indian Government or to prepare to do so. This in our opinion, has not been established by the prosecution by the evidence on record. These basic requirements for establishing an offence under Section 122 of the Indian Penal Code have not been fulfilled by the prosecution.

12. This view of the Patna High Court has been reiterated by the Supreme Court in exactly the same words in the case of *Nazir Khan v/s. State of Delhi,* **(2003) 8 SCC 461** in para 34 of its judgment.

13. In a recent judgment in the case of *State (NCT of Delhi) v/s.Navjot Sandhu alias Afsan Guru & Ors.,* **(2005) 11 SCC 600** the Supreme Court was considering a case where the accused had been charged for attacking

Parliament House on 13.12.2001. The Supreme Court, considering the scope of the term "waging war" while dealing with sections 121 and 121A, observed that the expression admits many shades of meaning and defies a definition with exactitude. It has held in paragraph 275 thus:

> 275. War, terrorism and violent acts to overawe the established Government have many things in common. It is not too easy to distinguish them, but one thing is certain, the concept of war embedded in Section 121 is not to be understood in the international law sense of inter-country war involving military operations by and between two or more hostile countries. Section 121 is not meant to punish prisoners of war of a belligerent nation. Apart from the legislative history of the provision and the understanding of the expression by various High Courts during the pre-independence days, the lllustration to Section 121 itself makes it clear that "war" contemplated by Section 121 is not conventional warfare between two nations. Organising or joining an insurrection against the Government of India is also a form of war. "Insurrection" as defined in dictionaries and as commonly understood connotes a violent uprising by a group directed against the Government in power or the civil authorities. "Rebellion, revolution and civil war" are progressive stages in the development of civil unrest the most rudimentary form of which is "insurrection" - vide Pan American World Air Inc. v. Aetna Cas & Sur Co. (FR 2dat p.1017). An act of insurgency is different from belligerency. It needs to be clarified that insurrection is only illustrative of the expression "war" and it is seen from the old English authorities referred to supra that it would cover situations analogous to insurrection if

> they tend to undermine the authority of the Ruler or the Government.

Taking a conspectus of various earlier decisions, both by the Indian Courts and the English Courts as also the commentaries of various learned authors, the Supreme Court observed thus in paras 282 and 283:

> 282. On the analysis of the various passages found in the cases and commentaries referred to above, what are the highlights we come across? The most important is the intention or purpose behind the defiance or rising against the Government. As said by Foster, "The true criterion is *quo animo* did the parties assemble?" In other words the intention and purpose of the warlike operations directed against the governmental machinery is an important criterion. If the object and purpose is to strike at the sovereign authority of the Ruler of the Government to achieve a public and general purpose in contradistinction to a private and a particular purpose, that is an important indicia of waging war. Of course, the purpose must be intended to be achieved by use of force and arms and by defiance of government troops or armed personnel deployed to maintain public tranquillity. Though the *modus operandi* of preparing for the offensive act against the Government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, armed or equipped is immaterial. Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or firearms. Then, the other settled proposition is that there need not be the pomp and pageantry usually associated with war such as the offenders

forming themselves in battle line and arraying in a warlike manner. Even a stealthy operation to overwhelm the armed or other personnel deployed by the Government and to attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war.

283. While these are the acceptable criteria of waging war, we must dissociate ourselves from the old English and Indian authorities to the extent that they lay down a too general test of attainment of an object of general public nature or a political object. We have already expressed reservations in adopting this test in its literal sense and construing it in a manner out of tune with the present day. **The court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawless and violent acts resulting in destruction of public properties, etc. and all acts of violent resistance to the armed personnel to achieve certain political objectives. The moment it is found that the object sought to be attained is of a general public nature or has a political hue, the offensive violent acts targeted against the armed forces and public officials should not be branded as a acts of waging war. The expression "waging war" should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of waging war against the Government. A balanced and realistic approach is called for in construing the expression "waging war" irrespective of how it was viewed in the long long past. An organised movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of levying war.** We doubt whether such construction is in tune with the modern day perspectives and standards. Another aspect

> on which a clarification is called for is in regard to the observation made in the old decisions that "neither the number engaged, nor the force employed, nor the species of weapons with which they may be armed" is really material to prove the offence of levying/waging war. This was said by Lord President Hope in R. v. Hardie in 1820 and the same statement finds its echo in many other English cases and in the case of Maganlal Radhakishan v. Emperor (AIR at p.185). But, in our view, these are not irrelevant factors. They will certainly help the court in forming an idea whether the intention and design to wage war against the established Government exists or the offence falls short of it. **For instance, the firepower or the devastating potential of the arms and explosives that may be carried by a group of persons - may be large or small, as in the present case, and the scale of violence that follows may at times become useful indicators of the nature and dimension of the action resorted to. These coupled with the other factors, may give rise to an inference of waging war**. (emphasis added).

14. On a consideration of the entire evidence on record, we find that none of the tests and criteria delienated by the Supreme Court in the *State (NCT of Delhi) v/s.Navjot Sandhu alias Afsan Guru & Ors.* (supra), are borne out by the evidence led by the prosecution. According to the prosecution, the print publications contained objectionable material and were, therefore, seized. As noted earlier, the prosecution has not led any evidence on record to substantiate this claim. It is possible that the accused had a political ideology, different from that of Government of India or

other political parties functioning in India. However, the prosecution has not placed any material on record to establish that the accused had literature in their possession which described their political philosophy. Nor is there evidence to prove that their political ideology was such that it preached disaffection or provoked insurgency. The articles in the magazines and journals have not been proved to have instilled or instigated them to follow an ideology and perform acts which amounted to waging a war against the Government of India. The Supreme Court in the case of *Nazir Khan v/s. State of Delhi (supra)* in paragraphs 30 and 33 of its judgment has observed thus:

> 30. The line dividing preaching disaffection towards the Government and legitimate political activity in a democratic set-up cannot be neatly drawn. Where legitimate political criticism of the Government in power ends and disaffection begins, cannot be ascertained with precision. The demarcating line is thin and wavy.
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> 33. It is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do so by force and violence or contravene any provision of law. Thus where the pledge of a society amounted only to an undertaking to propagate the political faith that capitalism and private ownership are dangerous to the advancement of society and work to bring about the end of capitalism and private ownership and the establishment of a socialist State for

> which others are already working under the lead of the working classes, it was held that it was open to the members of the society to achieve these objects by all peaceful means, ceaselessly fighting public opinion that might be against them and opposing those who desired the continuance of the existing order of the society and the present Government; that it would also be legitimate to presume that they desired a change in the existing Government so that they could carry out their programme and policy; that the mere use of the words "fight" and "war" in their pledge did not necessarily mean that the society planned to achieve its object by force and violence.

15. The prosecution has failed to establish that the literature obtained from the room was in any manner inflammatory or provocative or that it incited the readers to unite in waging war against the Government of India. The prosecution has not cared to bring on record the translations of the Urdu periodicals and the offending literature. A perusal of the impugned judgment does not disclose that such translations were made available to the learned trial Judge. However, the learned trial Judge has elaborately dealt with the criticism against India published in these Urdu periodicals. We are not aware as to how the learned Judge came to the conclusion that the Urdu periodicals criticised the premise that India was an ancient culture. Such criticism or the mere publication of photographs of some important dignitaries of India or

Osama Bin Laden or the President of America, would not in our opinion, establish that the literature incited and instigated the readers to wage war against the Government of India.

16. In our opinion, to establish that an offence under section 122 has been committed, it was incumbent on the prosecution to prove that the collection of men, arms and ammunition was for no other purpose but to prepare to wage a war against the Government of India. There is no evidence at all that these four individuals had organised a movement or were part of a movement, attended with violence or attacks against public officials. Nor is there any proof that they had collected the arms with a view to destruct public property, etc. which as the Supreme Court has held in the *State (NCT of Delhi) v/s.Navjot Sandhu alias Afsan Guru & Ors.* (supra) could amount to waging of war. It was necessary for the prosecution to establish that the fire power or the potential devastation which could be caused by the arms and ammunition recovered from the accused was such that it would point to their design to prepare to wage a war against the Government of India. The report of the ballistic expert which is on record does not disclose this fact. Although as held by the Supreme Court in *State (NCT of Delhi) v/s.Navjot Sandhu*

alias Afsan Guru & Ors. (supra), the term "waging war" must be understood in a different context in the present day scenario and not interpreted as done earlier in the general sense, there is no evidence at all on record to establish that the collection of the arms and the ammunition by the accused was for the purpose of preparing to wage war.

17. In such circumstances, it is obvious to us that the prosecution must fail. The charge under section 122 of the IPC has not been established. It appears that the prosecution was overawed by the fact that it claimed that the accused belonged to the Hizbul Mujahid and that the accused hailed from the State of Jammu and Kashmir. The prosecution has not established through its evidence that the accused did in fact belong to this organisation. There is no evidence on record to establish that this organisation is intent on waging war against the Government of India.

18. The fact that the accused were in possession of the arms without a licence has been established and therefore, there is no doubt that they have committed the offences under the Arms Act for which they have been convicted. However, in our opinion, the conviction under section 122 of the Indian Penal Code cannot be

sustained.

19. Under section 111A of the Indian Evidence Act, a presumption can be drawn against a person who is accused of having committed an offence punishable under section 122 of the Indian Penal Code. It can be presumed that a person charged under Section 122 of the Indian Penal Code, is guilty if it is shown that he had been in an area declared to be a disturbed area and where firearms or explosives were used or found to attack or resist the members of any armed forces or forces charged with the maintainance of public order, while discharging of their duties. However, the prosecution in this case has not established that the area from which the accused persons were arrested was a disturbed area or that the accused had used the firearms against persons charged with maintaining law and order in that area or the armed forces. Therefore, such a presumption under section 111A of the Indian Evidence Act also cannot be drawn in the present case.

20. Hence, the judgment of the learned Sessions Judge insofar as it convicts the accused under section 122 of the Indian Penal Code is set aside. Their conviction under sections 3 and 25(1B)(a) of the Arms Act is confirmed. The accused have been in jail since

their arrest on 24.10.2001. Although they were granted bail they have not availed of the order and have been in jail ever since their arrest i.e., for five years. Hence, they be released forthwith, if not otherwise required in law.

21. Appeal partly allowed accordingly.